PUBLIC PROSECUTOR

v.

TAY SING LEE & ANOR.

HIGH COURT SABAH & SARAWAK, TAWAU
TUAN IAN H.C. CHIN J
[CRIMINAL REVISION NO. T(43) 02 OF 1995]
3 AUGUST 1995

CRIMINAL LAW & PROCEDURE: *Customs - Seizure of goods - Release order - Statutory preconditions - Section 128 Customs Act 1967.*

CRIMINAL LAW & PROCEDURE: *Customs - Seizure of goods - Release thereof - Duty of Court - Enquiry under s. 128 Customs Act - Whether to be conducted - Magistrate making release order without hearing evidence in enquiry - Whether order a nullity.*

CRIMINAL LAW & PROCEDURE: *Revision - Magistrate making a nullity order in a civil proceeding - No appeal made against order - Whether order could be set aside by way of revision - Courts of Judicature Act 1964 s. 34 - Customs Act 1967 s. 128 - Criminal Procedure Code.*

INTERPRETATION: *Enquiry under s. 128 Customs Act 1967 - Whether in the nature of a civil proceeding.*

In this case the customs had seized a motor vehicle but had not instituted any prosecution in respect of the seizure. The vehicle was claimed by the respondents, and pursuant to that, an enquiry was held before the learned Magistrate pursuant to s. 128 of the Customs Act 1967. The customs prosecuting officer was late for the enquiry, and in the result the learned Magistrate "dismissed" the enquiry and made a release order releasing the vehicle to the second respondent, the owner thereof. The deputy public prosecutor sought to set aside the order and consequently applied for a revision of the order. Before the learned Judge, Counsel for the second respondent argued that the enquiry herein was in the nature of a civil proceeding, and that being the case, in the absence of any appeal, the order could not be revised upon by virtue of s. 34 Courts of Judicature Act 1964. The learned deputy referred to the revisionary power of the High Court provided by the Criminal Procedure Code, and submitted that the Court could exercise the power to set aside the Magistrate's order.

Held:

[1] It is clear from the provision of s. 128 that the Magistrate must still proceed with the enquiry whether the claimant of the goods appear or not. It follows that the customs must still adduce evidence to prove that a customs offence had been committed before a forfeiture can be ordered. Equally clear is that a release of the goods can only be made if the customs shall have failed to prove a customs offence. Thus, in an enquiry under the said s. 128, a duty is cast upon the Magistrate to consider the evidence, before a release order of the seized goods could be made.

[2] In the instant case, the release of the vehicle was the result of a "dismissal" of the enquiry which amounted to a failure to conduct an enquiry. There is however no provision in the Act for "dismissal" of the enquiry, or for the release of the vehicle to the claimant after a "dismissal" of the enquiry. This being the case, the order of the learned Magistrate can only be a nullity or an illegality.

[3] The enquiry is more in the nature of a civil proceeding and therefore, the Criminal Procedure Code cannot apply. But even if the Code applies, the customs had not appealed against the decision, and hence, had not been able to show that "good reasons" had existed herein as to call for a revision of the order. In the circumstances this Court will not exercise its revisionary power to set aside the order.

Per curiam:

The fact that the Court has opted not to exercise its power of revision does not mean that the order ceases to become a nullity. It is still a nullity and the customs is at liberty to resume possession of the vehicle and to ask the Court to hear the enquiry.

[Revision refused].

Cases referred to:

United Malayan Banking Corpn. Bhd. v. Syarikat Perumahan Lunas Sdn. Bhd. [1988] 1 MLJ 546 ***(refd)***

Craig v. Kanseem [1943] 1 All ER 108 ***(refd)***

Ban Hin Lee Credit Sdn. Bhd. v. Utama Computer Centre Sdn. Bhd. [1991] 2 MLJ 327 ***(refd)***

Wee Choo Keong v. MBf Holdings Bhd. & Anor. [1993] 2 AMR 28: 1205 SC ***(foll)***

Soong Chee Kang v. PP [1951] MLJ 5 ***(cit)***

Tang Kheng Teong & Anor. v. PP [1992] 2 CLJ 1273 ***(cit)***

Mohd. Dalhar bin Redzwan & Anor. v. Datuk Bandar, Dewan Bandaraya, KL [1995] 2 CLJ 210 ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 34

Customs Act 1967 s. 128

For the public prosecutor - Allaudeen bin Ismail, Senior Federal Counsel
For the defendant - Francis Chia; M/s. Lawrence Chai & Peter Soong

JUDGMENT

Ian H.C. Chin J:

Background

The customs department, Tawau, on 7 April 1993 seized one Volvo car bearing registration number SS3943C but no prosecution was instituted. The vehicle appears to have been claimed by one Tan Sing Lee and Asia Commercial Finance (M) Bhd.. Proceedings were thereafter instituted under s. 128 of the Customs Act, 1967, when the matter was referred to the Magistrate of the first class, Tawau. The Magistrate Court then sat on 28 March 1994, 30 March 1994 and 6 October 1994 all of which sittings were adjourned. The Magistrate Court then sat on 8 March 1995, with the Deputy Registrar sitting as a Magistrate, but she waited in her chambers until 9.30 a.m. and still the prosecution officer of the Customs Department did not turn up; this resulted in the following order being made by the learned Magistrate, *viz*:

> IT IS ORDERED THAT the enquiry under s. 128(4) of the customs Act 1967 be dismissed and IT IS FURTHER ORDERED THAT the complainant do release the vehicle SS3943C to the owner, the 2nd respondent.

This order was made after Mr. Tan Sing Lee, appearing in person, and Mr. Francis Chia, learned Counsel for Asia Commercial Finance (M) Bhd. had applied for the enquiry "to be struck off" and for the return of the said vehicle.

It was only by a letter dated 28 March 1995, which the Court received on 12 April 1995, that the learned deputy public prosecutor of the Customs Department, Kuala Lumpur, applied to

me to revise the said order. One of the reasons advanced was that the hearing of 8 March 1995, was conducted in chambers while the prosecution officer, Ling Kon Pau and 3 witnesses, were waiting in the open Court without knowing that the proceedings were done in chambers. I then heard the parties on 24 July 1995, to see whether I have the power to, and, if so, whether I should, revise the order. For the purpose of the hearing, the affidavit of the said prosecution officer was adverted to and this is, among others, what he said, *viz*:

> 3. On 8 March 1995 at 0915 am I arrived at the Magistrate Court situated at the ground floor, Court House, Tawau. At that time, the Court concerned was not in session. It was still vacant.
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> 4. On arrival, I sat down on a chair provided for prosecuting officer and defence Counsel. I waited there for my case no. T.S. (87) 455/93 to begin.
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> 5. After waited for about 20 minutes, I came out from the Magistrate Court and there I saw the learned Counsel Mr. Francis Chia Kee Tat accompanied by the 1st defendant Tan Sing Lee came down together from the first floor of the Court house.
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> 6. On seeing me Mr. Francis Chia Kee Tat said to me "I got the car already".

In short, the prosecution officer was late for the enquiry, a fact which the said letter requesting the revision did not disclose.

The contentions

What is the requirement of s. 128 of the Customs Act, 1967, with regard to the enquiry that has to be held? For ease of reference, the section is reproduced here:

> 128. Goods seized in respect of which there is no prosecution, or the proceeds of sale thereof, are forfeited if not claimed within one month.
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> (1) If there be no prosecution with regard to any goods seized under this Act, such goods or the proceeds of sale of such goods which are held pursuant to paragraph (c) of subsection (1) of s. 115 shall be taken and deemed to be forfeited at the expiration of one calendar month from the date of seizure of the goods unless, before such expiration -
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> (a) a claim to such goods or the proceeds of sale of such goods is made under subsection (2);
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> (b) a written application is made for the return of such goods under paragraph (a) or (b) of subsection (1) of s. 115: or
>
> (c) such goods are returned under the said paragraph (a) or (b).
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> (2) Any person asserting that he is the owner of such goods or the proceeds of sale of such goods, as the case may be, and that they are not liable to forfeiture may give written notice to a senior officer of customs that he claims the same.
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> (3) On the expiration of the period mentioned in subsection (1), or, if a decision is made earlier that there be no prosecution with regard to the goods, on the making of the decision the senior officer of customs shall, if such goods or the proceeds of sale of such goods are not taken or deemed to be forfeited under that subsection, refer the claim to the Director General who may direct that such goods or the proceeds of sale of such goods or the security furnished under paragraph (a) or (b) of subsection (1) of s. 115, as the case may be, released, or may direct such senior officer of customs, by information in the prescribed form, to refer the matter to a Magistrate of the first class for his decision.
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> (4) The Magistrate of the first class shall issue a summons requiring the person asserting that he is the owner of the goods or the proceeds of sale of such goods, and the

person from whom the goods were seized, to appear before him, and upon their appearance or default to appear, due service of such summons being proved, the Magistrate of the first class shall proceed to the examination of the matter, and upon proof that an offence against this Act or any regulations made thereunder has been committed and that such goods were the subject matter, or were used in the commission of such offence, shall order such goods or the proceeds of sale of such goods or the amount secured under paragraph (a) or (b) of subsection (1) of s. 115, as the case may be, to be forfeited, or in the absence of such proof, may order the release of such goods or the proceeds of sale of such goods or the security furnished under paragraph (a) or (b) of subsection (1) of s. 115, as the case may be.

(5) In any proceedings under subsection (4), s. 119 shall apply to the person asserting that he is the owner of the goods and to the person from whom they were seized as if such owner or person had been the defendant in a prosecution under this Act.

It is clear from the provision just quoted that the Magistrate must still proceed with the enquiry whether the claimant of the goods appear or not. This means the Customs Department must still adduce evidence to prove that a customs offence had been committed before a forfeiture can be ordered. It is also clear from the provision that a release of the goods (or its proceeds of sale) can only be made if the Customs Department shall have failed to prove a customs offence. Implicit in the provision is a duty cast upon the Magistrate to consider the evidence, which process forms a very important part of an enquiry. What happened in this case was that the prosecution officer, by his own admission, turned up in Court fifteen minutes late and in consequence, the Magistrate, it will be recalled, "dismissed" the enquiry and the release of the vehicle was a result of the "dismissal" of the enquiry. However, there is no provision for "dismissal" of the enquiry. There is also no provision for the release of the vehicle to the claimant after a "dismissal" of the enquiry. What the Magistrate could have done was to proceed with the enquiry and put it on record that he had called for the Customs Department to proceed to prove a customs offence but that the Customs Department had failed to do so on account of their failure to turn up to prove the customs offence. If she had done that, she would have been entitled to conclude that the Customs Department had failed to prove a customs offence which would in turn have entitled her to order a release of the vehicle. In that event, the enquiry could be considered to have been held. Unfortunately, that was not the case and the release of the vehicle, as mentioned earlier, was, at the prompting of the learned Counsel, the result of a "dismissal" of the enquiry which amounted to a failure to conduct an enquiry. I am therefore of the view that the order of the Magistrate is a nullity or an illegality. What then is the position of such an order? This was considered in *United Malayan Banking Corporation Bhd v. Syarikat Perumahan Lunas Sdn. Bhd.* [1988] 1 MLJ 546, 547, where Edgar Joseph Jr. J (as he then was) concluded, after citing Greene M.R. in *Craig v. Kanseem* [1943] 1 All ER 108, 113, that the Court could in exercise of its inherent jurisdiction set aside its own order which is a nullity. This case was followed in *Ban Hin Lee Credit Sdn. Bhd. v. Utama Computer Centre Sdn. Bhd.* [1991] 2 MLJ 327, 330, where Edgar Joseph Jr. J (as he then was) concluded that the order need not be attacked by way of appeal after relying on various other authorities which are mentioned in the following passage of his judgment, *viz*:

> In *Harkness v. Bell's Asbestos & Engineering Ltd.*[2] Lord Diplock stated the general at p. 736 thus:
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> > It his long been laid down that where an order is a nullity, the person whom the order purports to affect has the option of ignoring it or of going to the Court and asking for it to be aside.

This general rule was cited with approval by Abdoolcader J when speaking for the Federal Court in *Eu Finance Bhd. v. Lim Yoke Foo*[3] at p. 39 and he added:

> Where an order is a nullity, an appeal is somewhat useless as despite any decision on appeal, such an order can be attacked in collateral proceedings, before any Court or tribunal and whenever it is relied upon ... in other words it is subject to collateral attack. In collateral proceedings the Court may declare an act that purports to bind to be non existent.

And, in the next paragraph, he dealt with the failure to take advantage of the remedy of appeal where the impugned order is a nullity in the following words:

> Where a decision is null by reason of want of jurisdiction. It cannot be cured in any appellate proceedings, failure to take advantage of this somewhat futile remedy does not effect the nullity inherent in the challenged decision. The party affected by the decision may appeal "but is not bound to (do so) because he is at liberty to treat the act as void *(Birmingham Church-Wardens and Overseers v. Shaw.* [1849] 10 QB 868 (at p. 880 per Denman CJ)).

Those authorities must now be read in the light of *Wee Choo Keong v. MBf Holdings Bhd. & Anor.* [1993] 2 AMR 28: 1205 SC, 1209, where it is said:

> *Obedience to Court Order*
>
> It is established law that a person against whom an order of Court has been issued is duty bound to obey that order until it is set aside. It is not open for him to decide for himself whether the order was wrongly issued and therefore does not require obedience. His duty is one of obedience until such time as the order may be set aside or varied. Any person who fails to obey an order of Court runs the risk of being held in contempt with all its attendant consequences.

But that does not affect the issue at hand. Therefore, relying on the authorities I have cited, *supra*. I am of the view that it does not matter that there was no appeal against the said order because the order is still a nullity. That is the position of the illegal order.

Mr. Chia had argued that since an enquiry is in the nature of a civil proceeding, citing *Soong Chee Kong v. PP* [1951] MLJ 5, 7; *Tang Kheng Teong & Anor. v. PP* [1992] 2 CLJ 1273, 1277, the High Court should not revise the order since there was no appeal against the order and learned Counsel, as authority for that proposition, referred to s. 34 of the Court of Judicature Act 1964, which says:

> 34. No revision at instance of party who could have appealed.
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> Where an appeal lies from any decision in any civil matter, and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of a party who could have appealed.

Mr. Allaudeen bin Ismail, Senior Federal Counsel appearing for the Customs Department, has no answer for this submission. But he referred to the revisionary power of the High Court provided by the Criminal Procedure Code and submitted that the Court should exercise it to set aside the order. As was said earlier, the enquiry is more in the nature of a civil proceeding and therefore, the Criminal Procedure Code could not apply. Even assuming that the Criminal Procedure Code applies, the learned Senior Federal Counsel had not been able to show the Court the existence in this case of "very good reasons" for revision *(Mohd. Dalhar bin Redwan & Anor. v. Datuk Bandar, Dewan Bandaraya, KL* [1995] 2 CLJ 210) when the Customs Department did not appeal against the order.

Conclusion

I am therefore of the view that I should not exercise my power of revision. That of course does not mean that the order ceases to become a nullity; it is still a nullity. The Customs Department is at liberty to resume possession of the vehicle since the order releasing the vehicle is a nullity and to ask the Court to hear the enquiry. It is up to the Customs Department to decide, but bearing in mind the debacle in the prosecution of this case, the fact that Asia Commercial Finance (M) Bhd. may be an innocent victim, the very long time that the vehicle had been left lying idle since 7 April 1993, and the several Court sittings already had, whether they should further prosecute this matter.